

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

HEATHER K.,

Plaintiff,

Civil Action No.
5:19-CV-0462 (DEP)

v.

ANDREW M. SAUL, Commissioner of Social
Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF MID-NEW
YORK, INC.
Syracuse Office
221 South Warren Street, Suite 310
Syracuse, NY 13202

ELIZABETH V. KRUPAR, ESQ.

¹ Plaintiff's complaint named Nancy A. Berryhill, in her capacity as the Acting Commissioner of Social Security, as the defendant. On June 4, 2019, Andrew Saul took office as Social Security Commissioner. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

FOR DEFENDANT

HON. GRANT C. JAQUITH
United States Attorney
P.O. Box 7198
100 S. Clinton Street
Syracuse, NY 13261-7198

KEVIN PARRINGTON, ESQ.
Special Assistant U.S. Attorney

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.² Oral argument was heard in connection with those motions on April 29, 2020, during a telephone conference conducted on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and

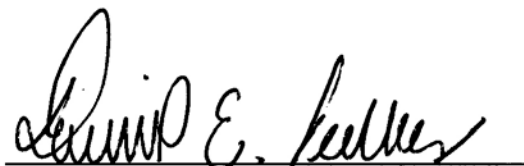
² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: May 8, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
HEATHER K.,

Plaintiff,

-v-

5:19-CV-462

ANDREW M. SAUL, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.
-----x

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. PEEBLES
April 29, 2020
100 South Clinton Street, Syracuse, New York

For the Plaintiff:
(Appearance by telephone)

LEGAL AID SOCIETY OF MID-NEW YORK, INC.
211 South Warren Street
Suite 310
Syracuse, New York 13202
BY: **ELIZABETH V. KRUPER, ESQ.**

For the Defendant:
(Appearance by telephone)

SOCIAL SECURITY ADMINISTRATION
J.F.K. Federal Building, Room 625
15 New Sudbury Street
Boston, Massachusetts 02203
BY: **LUIS PERE, ESQ.**

Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR
Official United States Court Reporter
100 South Clinton Street
Syracuse, New York 13261-7367
(315) 234-8545

1 (The Court and counsel present by telephone. Time
2 noted: 11:29 a.m.)

3 THE COURT: Plaintiff has commenced a proceeding
4 under 42, United States Code, Sections 405(g) and 1383(c)(3) to
5 challenge a determination by the Commissioner of Social Security
6 finding that plaintiff was not disabled at the relevant times
7 and therefore ineligible for the benefits for which she applied.

8 The background of this matter is as follows:
9 Plaintiff was born in January of 1977. She is currently
10 43 years of age. She was 38 years old at the alleged onset date
11 of her disability of January 1, 2015, and 39 years old at the
12 time she applied for benefits in February of 2016. Plaintiff
13 lives in Oneida in an apartment by herself. She has children
14 outside the home who, in May of 2016, were ages 17, 19, and 22.
15 She is currently separated from her husband. The apartment in
16 which she lives is a second floor apartment requiring her to
17 climb stairs.

18 Plaintiff stands 5'8" in height and weighs somewhere
19 approximately between 130 and 136 pounds. She is right-handed.
20 Plaintiff has a driver's license but no car. She has a 9th
21 grade education and a GED. While in school, she was in regular
22 classes.

23 Plaintiff stopped working in September of 2015
24 according to page 180 of the Administrative Transcript. It
25 appears that may have been a temporary job. She claims at page

1 181 that she has been unable to work since February 2, 2016.
2 Her past work includes working for T-Mobile, a communications
3 company; working in a Fastrac convenience store in 2010; various
4 food preparation positions; and a fieldworker in September 2014.
5 Plaintiff testified that she has made no effort to find work
6 since she moved to New York from Texas in or about 2014. That
7 is found at page 59 of the Administrative Transcript.

8 Medically, plaintiff has an extensive record of
9 medical treatment, both for physical and for mental impairments.
10 She suffered a motor vehicle accident in December of 2005 and
11 suffered a right foot injury, specifically a calcaneus fracture,
12 as well as a left leg laceration. She has had multiple
13 surgeries, her first occurred in January of 2006 by Dr. Daniel
14 Di Christina and it was an open reduction/internal fixation of
15 the right calcaneus area. She has had many other surgeries
16 since that time, including in 2007 and 2008.

17 The plaintiff also has cervical spinal issues,
18 specifically including at C5 and C6 level. She underwent a
19 cervical discectomy with fusion at that level in December of
20 2016. There were magnetic resonance imaging testing performed
21 in June of 2016, at page 2239 and 2240 of the Administrative
22 Transcript, and again in June of 2017, reflected at 2250 of the
23 Administrative Transcript. The cervical issues have been
24 addressed by Dr. Rudolph Buckley. As I indicated before, the
25 foot issues have been addressed by Dr. Di Christina. Plaintiff

1 also suffers from COPD and arthritis.

2 Mentally, plaintiff suffers from depression, anxiety,
3 posttraumatic stress disorder, bipolar disorder, and a
4 borderline personality disorder. She was hospitalized in
5 Missouri in 2010 for, among other things, cutting herself and
6 Oswego in 2006 twice. She receives counseling through the
7 Family Counseling Services of Cortland County.

8 Plaintiff has a fairly significant list of activities
9 daily living. She testified that she does not cook, but that
10 she does microwave and struggles with that to some degree. She
11 can clean. Plaintiff does not shop, a friend shops for her.
12 She does not do laundry. She does shower and dress and groom
13 herself. She listens to the radio. There was a conflict
14 concerning laundry at one point. I think at page 56 she may
15 have testified that she did and another time, she -- with
16 struggle and another time, she indicated she did not. She has
17 some friends. She watches television and she reads.

18 In terms of medication, at various times she has been
19 prescribed Trazodone, Seroquel, Vindoline, Lamictal, Gabapentin,
20 a nebulizer, and an inhaler. She also takes Aleve. She
21 testified at the hearing at page 60 that she is currently not
22 taking prescription pain medications.

23 She, for three years apparently, smoked synthetic
24 marijuana, but stopped in July of 2015. That's indicated at
25 page 253 and 1140 of the Administrative Transcript. Plaintiff

1 has smoked -- at one point, at 550, she stated 20 cigarettes per
2 day for the past 20 years; and at page 55, she stated one half
3 pack of cigarettes each day; at page 505, she stated one pack
4 per day.

5 Procedurally, plaintiff applied for Title XVI
6 Supplemental Security Income benefits on February 3, 2016,
7 alleging an onset date of January 1, 2015. In her field report,
8 she listed several impairments that she claims preclude her
9 ability to perform work functions, including PTSD, COPD,
10 emphysema, depression, anxiety, arthritis, borderline
11 personality disorder, degenerative disc disease, neck and spine
12 issues, right arm pain, bipolar disorder, depressive disorder,
13 foot issues, back issues, tenosynovitis of wrists, right foot
14 and ankle conditions, arthritis in the back, arthritis in the
15 right foot, bilateral tendonitis in the hands. When asked at
16 the hearing what precluded her from work, she indicated neck
17 issues, anxiety, right foot issue, back issues, right arm issue,
18 thumbs issue, wrist tendonitis, PTSD, bipolar disorder,
19 depression, COPD, and emphysema. That's at pages 47 and 48 of
20 the Administrative Transcript.

21 A hearing was conducted on April 15, 2018, by
22 Administrative Law Judge Bruce Fein to address plaintiff's
23 application. ALJ Fein issued an unfavorable decision on
24 July 19, 2018. That became a final determination of the agency
25 on March 4, 2019, when the Social Security Administration

1 Appeals Council denied plaintiff's application for review. This
2 action was commenced on April 19, 2019, and is timely.

3 In the Administrative Law Judge's decision, which I
4 found to be extremely comprehensive, ALJ Fein applied the
5 familiar five-step test for determining disability. At step
6 one, he concluded that plaintiff had not engaged in substantial
7 gainful activity since the date of her application on
8 February 3, 2016.

9 At step two, ALJ Fein found that plaintiff suffers
10 from several impairments that impose more than minimal
11 limitation on her ability to perform work-related functions,
12 including bipolar disorder, PTSD, borderline personality
13 disorder, status post talocalcaneal fusion of right foot, status
14 post C5-6 anterior cervical discectomy with fusion, depressive
15 disorder, and anxiety disorder.

16 At step three, ALJ Fein concluded that plaintiff's
17 conditions do not meet or medically equal any of the listed
18 presumptively disabling conditions set forth in the
19 Commissioner's regulations, specifically considering listings
20 1.02, 1.03, 1.04, 12.04, 12.06, 12.08, and 12.15.

21 The Administrative Law Judge next determined
22 plaintiff's residual functional capacity, or RFC, to include the
23 ability to lift and carry 10 pounds frequently and 20 pounds
24 occasionally, sit for six hours in an eight-hour workday with
25 normal breaks, stand and walk for two hours in an eight-hour day

1 with normal breaks. He went on to conclude that she suffers
2 from additional physical and mental limitations -- I should say
3 limitations based on, quote, physical and mental impairments,
4 which we'll come back to further on in this opinion.

5 At step four, applying that residual functional
6 capacity, ALJ Fein concluded that plaintiff did not have any
7 significant past relevant work to consider and proceeded to step
8 five where he applied the Medical-Vocational Guidelines set
9 forth in the Commissioner's regulations, the so-called grids.
10 And based on Grid Rule 201.27, which is a grid rule that applies
11 to sedentary work, the ALJ concluded that plaintiff was not
12 disabled at the relevant time.

13 As you know, my task is limited, the standard of
14 review which the Court must apply is extremely deferential. The
15 Court must determine whether correct legal principles were
16 applied and the resulting determination is supported by
17 substantial evidence. Substantial evidence is defined to mean
18 such relevant evidence as a reasonable person would find
19 adequate to support a conclusion. The Second Circuit Court of
20 Appeals in *Brault v. Social Security Administration*
21 *Commissioner*, reported 683 F.3d 443, a decision issued in 2012,
22 noted that this is an extremely stringent standard, it is more
23 exacting than the clearly erroneous standard. The Court, in
24 passing, also noted in *Brault* that the substantial evidence
25 standard means once an ALJ finds a fact, it can be rejected only

1 if a reasonable factfinder would have to conclude otherwise.

2 In this case, plaintiff raises four basic
3 contentions. She alleges error at step two for the ALJ's
4 failure to consider COPD as severe; she challenges the ALJ's
5 evaluation of the medical opinions in the record, and
6 specifically including Dr. Cole's opinion regarding irritants
7 and the opinions regarding plaintiff's mental limitations; she
8 challenges the ALJ's analysis of plaintiff's subjective
9 complaints, what we used to call the credibility two-step
10 analysis; and lastly, she contends at step five that the
11 Commissioner improperly resorted to the Medical-Vocational
12 Guidelines rather than eliciting testimony and opinion evidence
13 from a vocational expert. As you know, the burden of proof in
14 this case rests with the claimant through step four. It is the
15 claimant's burden to establish, among other things, her
16 impairments and the resulting limitations on the ability to
17 perform work functions.

18 Addressing the first argument, the governing
19 regulations provide that an impairment, or combination of
20 impairments, is not severe if it does not significantly limit a
21 claimant's physical or mental ability to do basic work
22 activities, 20 CFR Section 404.1521(a), and there's a
23 corresponding regulation in the 416 series governing SSI
24 applications. It is true that the second step requirement is de
25 minimis and intended only to screen out the truly weakest of

1 impairments, *Dixon v. Shalala*, 54 F.3d 1019, a Second Circuit
2 case from 1995. Importantly, however, the mere presence of a
3 diagnosed disease or impairment does not in and of itself prove
4 the limitation on ability to perform work-related functions.

5 I agree with the Commissioner's argument that any
6 error at step two is likely harmless because the ALJ did proceed
7 to the third step in the sequential analysis based on the
8 finding of other impairments, and at page 27 did, again, come
9 back and consider the potential effects of COPD on the ability
10 to perform work functions, but I further find that there's no
11 error at step two. The ALJ explained his rejection of COPD as
12 severe at both pages 17 and page 27 of the Administrative
13 Transcript. The records of plaintiff's treatment concerning
14 COPD show, at times, only a mild case and, at other times, show
15 that she is symptom free or asymptomatic, including at pages
16 443, 448, 1283, 1288, 1278, and 1581 of the Administrative
17 Transcript.

18 I recognize that Dr. Cole says that the plaintiff,
19 quote, should avoid irritants, but it is also noteworthy that
20 plaintiff is a longstanding smoker. In any event, I find no
21 error and I find that the rejection of COPD as severe is
22 appropriately stated and defended by the Commissioner.

23 In terms of weighing the medical opinions, for a
24 similar reason I find that Dr. Cole's opinion concerning
25 irritants was not adopted. It is for the Administrative Law

1 Judge to weigh medical opinion and evidence under *Veino*. I find
2 that the Commissioner's decision concerning the irritant issue
3 is well explained and supported by substantial evidence as
4 indicated. I'm not sure I agree with the Commissioner that if
5 there was a limitation on the exposure to irritants it would not
6 effect the analysis at step five. SSR 85-15 speaks to irritants
7 and environmental restrictions and indicates that where an
8 environmental restriction falls between very little and
9 excessive, resolution of the issue will generally require
10 consultation of occupational reference materials or the services
11 of a vocational expert. Again, I find no error in the failure
12 to include any limitation concerning exposure to irritants in
13 the residual functional capacity finding.

14 Turning to the issue of mental impairments, with the
15 specific issue of the ability to deal with supervisors and
16 coworkers, there are several opinions that address that in the
17 record. Dr. Pzetzo -- I won't venture to try to pronounce that
18 name -- he is a non-examining consultant. He found a moderate
19 limitation in that area at pages 78 and 73. The opinion was
20 given some weight by the Administrative Law Judge. Dr. Santoro,
21 an examining consultant, found a moderate difficulty in relating
22 to others at page 502. The plaintiff's therapist, Chrystal
23 Fox-McCormick, found a marked limitation in this area at page
24 681. That, however, was rejected for two reasons: Number one,
25 under the regulations that were in place at the time,

1 plaintiff's claim was adjudicated, she was not an acceptable
2 medical source and she had limited treatment at the time this
3 opinion was rendered since she had only begun treating plaintiff
4 in December of 2016. What the ALJ noted was that another
5 non-examining physician, Dr. De Paz-Ortiz, found no significant
6 limitation in this area at page 737. That opinion was given the
7 most weight at page 27 of the Administrative Transcript.

8 Again, under *Veino*, it was for the Administrative Law
9 Judge to weigh these countering opinions and it would be
10 improper for the Court to reweigh them. I note that there is no
11 opinion from an acceptable treating source to the contrary of
12 Dr. De Paz-Ortiz's opinion and that might change the analysis.
13 I also note that at page 200 of the Administrative Transcript,
14 on April 4, 2016, the plaintiff stated she has no difficulty in
15 getting along with bosses, police, landlords or other people
16 with authority and has never lost a job because of problems
17 getting along with people. So I find no error in the weighing
18 of the opinions, it was for the Administrative Law Judge to
19 weigh them and to explain how each was evaluated, and that
20 explanation was made.

21 The credibility analysis, I'll call it the weighing
22 of plaintiff's subjective complaints, is governed by SSR 16-3p.
23 The Administrative Law Judge did not merely state without
24 explanation why he found plaintiff's claims not to be fully
25 credible. There was some extensive discussion between pages 20

1 and 29 of the Administrative Transcript. He concluded that they
2 were not fully credible at page 26, but the opinion, of course,
3 must be read as a whole. Plaintiff's physical conditions and
4 claims were evaluated at page 20 to 25 and some of the factors
5 deemed appropriate and appropriately considered by the
6 Administrative Law Judge included the fact that she was not
7 taking any prescription pain medications and her treatment had
8 been fairly conservative after the surgeries and relatively
9 benign findings are reflected in the medical records.

10 The mental condition and claims were evaluated at
11 pages 25 and 26. Once again, the Administrative Law Judge
12 considered those claims, but against the inconsistent treatment
13 that plaintiff was receiving and the attendance issues, which
14 are reflected in the records, it is for the Administrative Law
15 Judge to weigh plaintiff's subjective claims and his
16 determination is entitled to considerable deference. When the
17 record is considered as a whole, I find no error in the
18 evaluation of plaintiff's subjective complaints.

19 The last issue is one that I found intriguing and a
20 somewhat close case. The Commissioner, of course, bears the
21 burden at step five. When the Administrative Law Judge noted
22 that although some of the exertional limitations would support a
23 finding of light work, because of plaintiff's inability to walk
24 and stand the required amount of time under light work, he
25 considered the Medical-Vocational Guidelines relating to

1 sedentary work. He concluded that the grids could be relied on
2 and that Grid Rule 201.27 would direct a finding of no
3 disability.

4 A case where there are both exertional and
5 nonexertional limitations is controlled at step five by SSR
6 83-14. In this case, the Administrative Law Judge did consider
7 that grid rule. He found that the climbing limitation would
8 have no significant effect on the ability to perform work
9 functions and he turned to SSR 85-15 for guidance. He also
10 found that the ability to frequently balance, stoop, kneel,
11 crouch, and crawl would have no significant impact on the job
12 base under SSR 96-9p, and that is supported by SSR 85-15.

13 I know that one of my former colleagues, Magistrate
14 Judge Andrew Peck, in *Prince* was critical -- *Prince v. Colvin*,
15 2015 WL 1408411, was critical of resort to SSR 85-15 when there
16 were both exertional and non-exertional limitations, but I think
17 that it can inform and provide guidance as to what impact
18 certain limitations would have on the erosion of the job base on
19 which the grids are predicated.

20 Mentally, the Administrative Law Judge concluded that
21 plaintiff is capable of performing simple routine and repetitive
22 tasks, performing low stress work, which is defined as requiring
23 only occasional decisionmaking, occasional changes in the work
24 setting, and occasional judgment, and occasionally interacting
25 with the public. That does not erode the job base. SSR 85-15

1 provides that, quote, the basic mental demands of competitive,
2 remunerative, unskilled work include the abilities (on a
3 sustained basis) to understand, carry out, and remember simple
4 instructions; to respond appropriately to supervision,
5 coworkers, and usual work situations; and to deal with changes
6 in a routine work setting. A substantial loss of the ability to
7 meet any of these basic work activities would severely limit the
8 potential job base.

9 As the Administrative Law Judge found, the RFC
10 indicates that the plaintiff does retain the ability to meet the
11 basic requirements of work under SSR 85-15, so I find that the
12 Commissioner's decision at step five was appropriate and that
13 the Commissioner carried its burden at step five to show that
14 plaintiff is not disabled based on the application of the
15 Medical-Vocational Guidelines.

16 So in conclusion, I find no error and that the
17 determination is supported by substantial evidence. I will
18 grant judgment on the pleadings to the defendant and direct
19 dismissal of the plaintiff's complaint.

20 Again, thank you both for excellent presentations. I
21 hope you stay safe in this interesting environment.

22 MR. PERE: Thank you very much, your Honor.

23 MS. KRUPER: Thank you, your Honor. Everybody, stay
24 safe.

25 THE COURTROOM DEPUTY: Thank you.

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THE COURT: Thank you.

(Time noted: 11:57 a.m.)

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2 CERTIFICATE OF OFFICIAL REPORTER
3

4
5 I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR,
6 NYRCR, Official U.S. Court Reporter, in and for the United
7 States District Court for the Northern District of New York, DO
8 HEREBY CERTIFY that pursuant to Section 753, Title 28, United
9 States Code, that the foregoing is a true and correct transcript
10 of the stenographically reported proceedings held in the
11 above-entitled matter and that the transcript page format is in
12 conformance with the regulations of the Judicial Conference of
13 the United States.

14
15 Dated this 7th day of May, 2020.

16
17 x Hannah F. Cavanaugh

18 HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR
19 Official U.S. Court Reporter
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